Nos. 90-344, 90-367

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

TRANSWESTERN PIPELINE COMPANY,

Petitioner,

v.

KANSAS POWER AND LIGHT COMPANY, *et al.*,

Respondents.

FEDERAL ENERGY REGULATORY COMMISSION,

Petitioner,

v.

PUBLIC UTILITIES COMMISSION OF CALIFORNIA, *et al.*,

Respondents.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF IN OPPOSITION OF RESPONDENTS, THE KANSAS POWER AND LIGHT COMPANY AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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QUESTION PRESENTED

Whether the court of appeals erred in determining that the filed rate doctrine under the Natural Gas Act did not allow the Federal Energy Regulatory Commission to authorize Transwestern Pipeline Company to retroactively increase its rates for gas already sold to its customers.

PARTIES TO THE PROCEEDING

In addition to Respondents, The Kansas Power and Light Company and the Public Utilities Commission of the State of California, the parties to the proceeding before the court of appeals were:

Citizens Energy Corporation
El Paso Natural Gas Company
Federal Energy Regulatory Commission
Natural Gas Clearinghouse Inc.
Pacific Gas and Electric Company
Process Gas Consumers Group
PSI, Inc.
Southern California Gas Company
Southwest Gas Corporation
Texas Eastern Transmission Corporation
Transwestern Pipeline Company
Williams Natural Gas Company

RESPONDENT'S RULE 29.1 STATEMENT

The Kansas Power and Light Company is a publicly traded corporation. It has no parent company and no subsidiaries which are not wholly owned.

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BRIEF IN OPPOSITION OF RESPONDENTS, THE KANSAS POWER AND LIGHT COMPANY AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

STATEMENT OF THE CASE

The Respondent, The Kansas Power and Light Company (KPL), is a natural gas local distribution company doing business in the states of Kansas, Missouri, and Oklahoma. It is a customer of the Williams Natural Gas Company (WNG) which ceased being a customer of Petitioner, Transwestern Pipeline Company (Transwestern) on February 1, 1988. The Respondent, Public Utilities Commission of the State of California (CPUC), is a state agency which regulates Southern California Gas Company (SoCal), which had previously been a sales customer of Transwestern. The CPUC represents the interests of natural gas consumers throughout California in administrative and judicial proceedings. Under the rulings of the Federal Energy Regulatory Commission, reviewed below by the United States Court of Appeals for the District of Columbia, Transwestern was authorized to direct bill certain costs to WNG, which in turn was allowed to recover them from KPL, and to SoCal, which would seek to recover them from southern California consumers, who are represented herein by the CPUC.

Petitioners challenge a decision of the court of appeals finding that a procedure proposed by Transwestern and approved by the Federal Energy Regulatory Commission (FERC or Commission) for "direct billing" of certain deferred gas costs to its customers violated the filed rate doctrine under the Natural Gas Act (NGA). Without direct billing, the pipeline would have sought to recover these costs *prospectively* as part of its sales commodity rate to its customers. Under the method approved by the Commission, however, the pipeline was authorized to assign responsibility and bill its customers for

the costs *retroactively* based on each customer's pro rata share of total contract demand on the system at an earlier time.

Transwestern proposed direct billing as part of its voluntary application for authority to implement a gas inventory charge (GIC) pursuant to guidelines established by the FERC in its Order No. 500.[1] Transwestern indicated that if the GIC was made effective, the pipeline would terminate its purchased gas adjustment clause (PGA). The PGA is the mechanism used by most pipelines to recover their cost of purchased gas. It is comprised of two components – a rate meant to reflect the cost of current gas purchases and a surcharge intended to recoup the difference between costs incurred and costs recovered.

The difference between cost recovery and cost incurrence is accrued to Account 191 – Unrecovered Purchased Gas Costs. Under currently effective regulations, a surcharge is determined annually by dividing the amount in Account 191 by the pipeline's estimate of sales for the next twelve months. 18 C.F.R. §154.305(c)(3). Over time,

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[1] *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 500, FERC Stats. & Regs. ¶ 30,761, *modified*, Order No. 500-A, FERC Stats. & Regs. ¶ 30,770, *reh'g granted in part*, Order No. 500-B, FERC Stats. & Regs. ¶ 30,772, *modified*, Order No. 500-C, FERC Stats. & Regs. ¶ 30,786 (1987), *modified*, Order No. 500-D, FERC Stats. & Regs. ¶ 30,800, *reh'g denied*, Order No. 500-E, 43 FERC ¶ 61,234, *modified*, Order No. 500-F, FERC Stats. & Regs. ¶ 30,841 (1988), *reh'g denied*, Order No. 500-G, 46 FERC ¶ 61,148 (1989), *remanded sub nom. American Gas Ass'n v. FERC*, 888 F.2d 136 (D.C. Cir. 1989), *order on remand*, Order No. 500-H, FERC Stats. & Regs. ¶ 30,867 (1989), *reh'g denied in part*, Order No. 500-I, FERC Stats. & Regs. ¶ 30,880 (1990), *remanded sub nom. American Gas Ass'n v. FERC*, No. 87-1588, *et al.*, (D.C. Cir. Aug. 20, 1990).

assuming that the pipeline is able to keep its gas marketable, the surcharge will allow the pipeline to match its revenue to its gas costs. Since, if its proposal was accepted, Transwestern would no longer have a PGA surcharge in effect, the pipeline proposed to clear its Account No. 191 by direct billing the amounts in it to its sales customers.

ARGUMENT

Review by this Court is not warranted. The ruling of the court of appeals is correct. It is consistent with basic principles of statutory construction and interpretations of the NGA and the "filed rate doctrine" by this Court. The court of appeals acted properly in barring the attempt by the pipeline and the Commission to impose retroactive charges upon consumers of natural gas. The decision below is also consistent with established principles of ratemaking for regulated utilities and with the consumer protection purposes of the NGA.

This case presents no substantial question for review by this Court. In fact, the court of appeals' ruling below is entirely consistent with the decision of this Court on the filed rate doctrine in its most recent term in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 110 S. Ct. 2759 (1990). The decision of the court of appeals is also consistent with both its prior rulings and those of other courts of appeals on the same matter.

The petition for writ of certiorari should be denied.

I. THIS COURT SHOULD NOT HOLD THIS CASE SUBJECT TO ITS RULING IN THE *AGD II* APPEAL.

The Commission requests that if the Court grants its certiorari petition in *Associated Gas Distributors v. FERC* (*AGD II*), 893 F.2d 349 (D.C. Cir. 1989),[2] that it hold this case for disposition as appropriate in light of the ruling in that appeal. The Commission states that a decision in that case would "shed considerable light on the appropriate disposition of this case . . . . " Petition for Writ of Certiorari of the Federal Energy Regulatory Commission (FERC Pet.), at 11. In *AGD II*, the court of appeals rejected the use of an allocation formula for direct billing as the basis for recovery by pipelines of a portion of their current costs incurred in settling take-or-pay disputes. Even if review by this Court were appropriate in *AGD II*, the procedure urged by the Commission should not be followed in this case.

The approach proposed by the Commission would only be appropriate if it were clear that a ruling by this Court in *AGD II* would be directly applicable to this matter. In fact, the Commission's statements in its *AGD II* certiorari petition (*AGD II* Pet.) indicate that is not the situation. The Commission views its actions which are the subject of review in *AGD II* quite differently from those at issue here. In its *AGD II* petition, the Commission argued that the allocation method it had approved did not impose a rate increase for gas already sold. *AGD II* Pet., at 21-22. The Commission argued that it had

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[2] The Commission's certiorari petition was docketed in this Court as *Federal Energy Regulatory Commission v. Associated Gas Distributors, et al.*, No. 89-2016.

> instead ordered customers to pay a new rate on a prospective basis to cover a portion of the costs of [the pipeline]'s settlement of its take-or-pay exposure, and it allocated those current costs among [the pipeline]'s customers on the basis of the relative amounts of gas they did *not* purchase during the deficiency period.

Ibid. at 22. (Underscore added; italics original.) By contrast, there is no question that the present case relates to *retroactive* recovery of *past* costs and that the costs in question relate to the "gas that [Transwestern] purchased and *sold* to its customers, SoCal and Williams, prior to May 11, 1988." FERC Pet., at 9. (Emphasis added.)

In view of the above, a mere comparison of the FERC's two positions before this Court (i.e., *compare AGD II* Pet. at 21-22 *with* FERC Pet. at 9) shows that the two cases are totally different and that the present case is not certworthy.

II. THE COURT OF APPEALS FOLLOWED AND APPLIED ESTABLISHED PRINCIPLES OF STATUTORY CONSTRUCTION.

A. The Statutory Framework and the Filed Rate Doctrine.

Section 4(a) of the NGA provides that:

> [a]ll rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission . . . shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

15 U.S.C. §717c(a). In order to assure that rates charged by companies within the Commission's NGA jurisdiction are "just and reasonable," the Act requires that pipeline rates be filed with the Commission and kept available for public inspection, 15 U.S.C. §717c(c), and prohibits the granting of "undue preference or advantage" to any customer or any "unreasonable difference" in rates "as between localities or as between classes of service." *Ibid.*

Proposed rate changes must, of course, be filed with the Commission and rates may not be changed except with Commission approval upon thirty days' notice to the Commission and the public. 15 U.S.C. §717c(d). For "good cause shown," the Commission may

> allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

Ibid.

Consistent with these statutory provisions, this Court has developed and applied the "filed rate doctrine" which "prohibits a federally regulated seller of natural gas from charging rates higher than those filed with the Federal Energy Regulatory Commission . . . . " *Arkansas Louisiana Gas Co. v. Hall* (*Arkla*), 453 U.S. 571, 573 (1981). According to the Court, "the right to a reasonable rate is the right to a rate which the Commission files or fixes." *Montana-Dakota Utilities Company v. Northwestern Public Service Company*, 341 U.S. 246, 251-52 (1951). As a result, both the Commission and the courts lack authority to

change rates retroactively. The rule thus "bars 'the Commission's retroactive substitution of an unreasonably high or low rate with a just and reasonable rate.' " *Arkla*, 453 U.S. at 578, *quoting City of Piqua v. FERC*, 610 F.2d 950, 954 (D.C. Cir. 1979). Summarizing the rule, this Court has stated that:

> the Act bars a regulated seller of natural gas from collecting a rate other than the one filed with the Commission and *prevents the Commission itself from imposing a rate increase for gas already sold.*

Arkla, 453 U.S. at 578. (Emphasis added.)

The filed rate doctrine had its origins in this Court's cases interpreting the Interstate Commerce Act, *see, e.g., Lowden v. Simonds-Shield-Lonsdale Grain Co.*, 306 U.S. 516, 520-21 (1939); *Pennsylvania R. Co. v. International Coal Co.*, 230 U.S. 184, 196-97 (1913), "and has been extended across the spectrum of regulated utilities." *Arkla*, 453 U.S. at 577. Its long-standing application by this and other courts has made it an integral part of the NGA.

Just last term this Court revisited and reaffirmed its traditional view of the filed rate doctrine in *Maislin*. In its ruling reversing the Interstate Commerce Commission (ICC), the Court adhered strictly to the principles discussed above. The *Maislin* case dealt with the ICC's application of its Negotiated Rates policy. In its order enunciating that policy, the ICC discussed a growing trend in the motor carrier industry for carriers and shippers to negotiate rates lower than those on file with the ICC. The ICC ruled that the shippers would not be required to pay the tariffed rate concluding that, under such circumstances, "it could be fundamentally unfair not

to consider a shipper's equitable defenses to a claim for undercharges." *NITL – Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates (Negotiated Rates I)*, 3 I.C.C.2d 99, 103 (1986).

The ICC's ruling was based on its conclusion that the passage of the Motor Carrier Act of 1980, which significantly deregulated the motor carrier industry, justified departure from strict adherence to the filed rate requirement. The ICC ruled that the new competitive atmosphere in the industry was sufficient to deter discrimination. 3 I.C.C.2d at 106. The ICC clarified its new policy in *NITL – Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates (Negotiated Rates II)*, 5 I.C.C.2d 623 (1989). The Commission explained that its policy did not recognize "equitable defenses" but rather applied the "affirmative statutory requiremen[t] and obligatio[n]" of the Interstate Commerce Act that a carrier's practices be reasonable. 5 I.C.C.2d at 631 n. 18. The Commission stated that it was finding it to be an unreasonable practice for carriers to negotiate rates with customers, not publish the rates and later demand payment at the tariffed rates after service had been rendered. 5 I.C.C.2d at 628 n. 11.

On appeal, the Court followed its traditional view of the filed rate doctrine and ruled that the ICC's abandonment of strict adherence to it was unlawful. The Court relied in part on the "classic statement" of the doctrine as explained in *Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94 (1915). As the Court there stated:

> Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any

> pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable.

Ibid. at 97.

The court of appeals properly applied these principles in the case below. SoCal and WNG were on notice of only the rates on file with the Commission when they took service and paid for service under those rates. Under the direct billing mechanism, however, the pipeline obtained authority to impose a retroactive rate alteration upon its customers

> over and above the rates on file at the time of the sale, for the gas they had already purchased. However described, this constitutes a retroactive rate increase . . . prohibited by the NGA.

Columbia Gas Transmission Corp. v. FERC (*Columbia I*), 831 F.2d 1135, 1140 (D.C. Cir. 1987); *see also Arkla*, 453 U.S. at 578 n. 8.[3] Consistent with the rigid application of the filed rate doctrine embraced by the *Maislin* Court, the court of appeals properly ruled that the Commission had no authority to retroactively raise Transwestern's rates to SoCal and WNG. *Transwestern Pipeline Co. v. FERC*, 897 F.2d 570, 577 (D.C. Cir. 1990).

B. The Court of Appeals Properly Employed the Applicable Principles of Statutory Construction.

Transwestern correctly indicates that the standard for review in this case is that established by *Chevron, U.S.A.*,

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[3] See discussion of the direct billing mechanism *supra*, at pages 2-4.

Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). However, contrary to Transwestern's assertions, the court of appeals' review of the Commission's actions was consistent with the applicable standards of statutory construction.

1. The Filed Rate Doctrine.

The argument made by Transwestern in this case is remarkably similar to that made by the ICC and rejected by the Court in *Maislin*. In that case, the ICC argued that its decision to abandon the filed rate doctrine was justified by changes in the industry which it regulated and that the ICC was, under the *Chevron* rule, entitled to deference since the Act did not "specifically address the types of practices that are to be considered unreasonable and because its construction is rational and consistent with the statute." *Maislin*, 110 S. Ct. at 2768. The Court rejected this argument. Since Congress had not diverged from the strict interpretation of the filed rate doctrine traditionally followed by the Court, it refused to revisit its prior interpretations of the rule. *Ibid.*[4]

Since the filed rate doctrine under the NGA is rooted in the Interstate Commerce Act, *Arkla*, 453 U.S. at 577, the Court's logic in *Maislin* is equally applicable here. The

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[4] The Court cited its decision in *California v. FERC*, 109 S. Ct. 2024, 2029 (1990), in which it recognized the respect the "Court must accord to long-standing and well-entrenched decisions, especially those interpreting statutes that underlie complex regulatory regimes."

Court's long-standing interpretation of the filed rate doctrine is so deeply ingrained in the NGA that the Commission's contrary interpretation is simply not permissible since it is inconsistent with the regulatory scheme as Congress enacted it and understood it to function.

Transwestern also argues that the court of appeals failed to give proper deference to the Commission's finding that the pipeline's customers had sufficient notice to overcome the requirements of §4(d) of the NGA and the filed rate doctrine. As the court of appeals found with regard to notice, however, the only notice that Transwestern's customers had prior to the Commission's May 11, 1988 order was that they might be liable for recovery of deferred gas costs through the operation of the Account 191 surcharge if they continued to purchase gas from the pipeline. *Transwestern Pipeline Co. v. FERC*, 897 F.2d at 579-81.

Concerning the filed rate doctrine issue, Transwestern echoes the argument made by the ICC in *Maislin*. On that issue, the pipeline argues that the court of appeals departed from acceptable norms of judicial proceedings by failing to accept "FERC's reasonable and equitable solution to the residual cost responsibility issues left in the wake of the 'open-access' transition." Petition for Writ of Certiorari of Transwestern Pipeline Company (Transwestern Pet.), at 22. To the contrary, application of the *Chevron* test in this case leads to the same conclusion as that reached in *Maislin* – that the Commission's interpretation of the act is impermissible since it would result in the very occurrences which the act was meant to avoid: 1) the application of a rate not on file when the sale occurred; and 2) the imposition of a rate increase for gas already sold. *See Arkla*, 453 U.S. at 578.

2. Waiver of the Filed Rate Doctrine.

Transwestern alleges that the court of appeals' decision "effectively reads out of Section 4(d) of the NGA the express authority vested in FERC to waive the notice requirement." Transwestern Pet., at 22. In fact, by holding that the notice requirement may not be waived, the court below acted consistently with long-standing precedents and kept the Commission from reading *into* the statute an exception to the filed rate doctrine wholly inconsistent with the regulatory scheme.

The jurisprudence concerning the commission's power to waive the filed rate doctrine is quite limited. No court has ever found a general power in the Commission to waive the application of the rule. The courts of appeals have dealt with the issue on several occasions. However, the courts have found waivers to be allowed only in cases in which the parties had agreed to the rates to be effective *before* they were filed with the Commission. *See, e.g., City of Piqua, supra* at 954; *City of Girard v. FERC*, 790 F.2d 919, 922-23 (D.C. Cir. 1986) (in which the court rejected a waiver request due to the lack of an agreement); and *Hall v. FERC*, 691 F.2d 1184, 1192 (5th Cir. 1982).[5] In light of

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[5] It is also clear that the statute allows the Commission to shorten the notice of a rate change to less than the statutorily provided 30 days. 15 U.S.C. §717c(d). For example, for good cause shown, the Commission may allow a rate change to be effective on notice as short as one day. However, the Commission's argument that it may retroactively waive such notice would allow its limited power under this section to swallow the filed rate doctrine.

the Commission's duty to protect consumers from exploitation at the hands of the natural gas companies, *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 610 (1941); *Maryland People's Counsel v. FERC*, 761 F.2d 780, 781 (D.C. Cir. 1985), it would be strange indeed if the Commission could waive the rights of the very customers it is obligated to protect to benefit the companies it is empowered to regulate.

These rulings in these cases are, of course, totally consistent with this Court's ruling in *Arkla*. In that case, the Court recognized that the right to a reasonable rate is the right to pay only rates set by the Commission to have prospective effect. *Arkla*, 453 U.S. at 577, 578.[6] Only by requiring rates to be filed with and approved by the Commission before they are assessed can the mandate of *Arkla* and its progeny be fulfilled. As shown by *Maislin*, strict compliance with the filed rate doctrine continues to be required by this Court.[7]

Finally, the decision of the court of appeals is consistent with the statute. NGA §4 includes recitations that rates must be "just and reasonable," 15 U.S.C. §717c(a), filed with the Commission and available for public

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[6] Admittedly, the Court did suggest that the Commission may "permit a waiver." *Arkla*, 453 U.S. at 577. However, that language was clearly dictum and, in any event, there is no discussion in *Arkla* of the circumstances under which a waiver might be appropriate.

[7] In *Maislin*, the Court reiterated the *Maxwell* Court's statement that the filed rate doctrine is "undeniably strict, and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress." 110 S. Ct. at 2766, *quoting Maxwell*, 237 U.S. at 97.

inspection, 15 U.S.C. §717c(c), and non-discriminatory. 15 U.S.C. §717c(b). The Commission is responsible for ensuring that these provisions of the NGA are followed. Clearly, the drafters of the NGA intended, consistent with practice under the Interstate Commerce Act with which they were familiar when the NGA was adopted, that only rates filed with the Commission may be charged by the companies it regulates.[8]

The interpretation of the filed rate doctrine followed by the court of appeals is consistent with the statute and this Court's view of it. As the Court recognized in *Maislin*, while the Commission

> has both the authority and expertise generally to adopt new policies when faced with new developments in the industry, it does not have the power to adopt a policy that directly conflicts with its governing statute. . . . Generalized congressional exhortations to "increase competition" cannot provide the [Commission] authority to alter the well-established statutory filed rate requirements.

110 S. Ct. at 2770. (Citation omitted.)

Moreover, since the Court's interpretation is of long standing, Congress "must be presumed to have been fully

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[8] The Commission contended and Transwestern now argues that the authority under §4(d) of the Act to waive the 30 day notice provision translates into a power to waive the filed rate doctrine altogether. Given the context of the waiver language, the interpretations of the filed rate doctrine by this and other courts over many years, and the explicit requirement throughout the NGA that rates be on file and open to public inspection, this argument is baseless.

cognizant of this interpretation of the statutory scheme, which had been a significant part of our settled law for over a half a century . . . . " *Square D Co. v. Niagara Frontier Traffic Bureau, Inc.*, 476 U.S. 409, 420 (1986). Since the court of appeals has merely followed the traditional view of the filed rate doctrine which this Court recently reaffirmed in *Maislin*, there is no basis for the granting of a writ.

III. THE COURT OF APPEALS' RULING DOES NOT CONFLICT WITH THE NGPA OR PGA REGULATIONS.

As a further ground for obtaining review by this Court, Transwestern asserts that the court of appeals denied the pipeline its

> statutory entitlement to recovery of gas costs – whether as undercollections recorded in Account No. 191 or otherwise – if it demonstrates that such costs are (i) costs paid for the purchases of natural gas and, (ii) do not exceed the NGPA Title I price ceilings and (iii) are not excessive due to fraud, abuse, imprudence or other grounds.

Transwestern Pet., at 26.

Transwestern's argument is based on misconceptions of both the effect of the ruling of the court of appeals and the meaning of Section 601 of the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. §3431. First, the decision below did not bar Transwestern from recovering its deferred gas costs but merely rejected the method selected by the pipeline and approved by FERC. It was up to Transwestern and not the court of appeals to design a legal mechanism for recovery of its deferred gas costs. For

instance, Transwestern could have taken the course adopted by Texas Eastern Transmission Corporation when it proposed its GIC. Texas Eastern kept its PGA in operation thereby eliminating the need to find an alternate method for recovery of its deferred gas costs. *Texas Eastern Transmission Corp.*, 44 FERC ¶61,413, at 62,325 (1988).

Second, while NGPA §601 precludes the Commission or a court from disallowing gas costs which meet the conditions listed by Transwestern, it does not *guarantee* that the costs will be *recovered*. Even if the gas prices paid by the pipeline are legal – and included in the pipeline's rates – whether there will be full recovery of those costs has always been directly affected by the marketability of the pipeline's gas. It was Transwestern's decision to abandon PGA pricing for its gas, based at least in part on its determination of the market risk inherent in PGA versus GIC pricing. Transwestern could have retained its PGA and cleared its Account No. 191 balance by absorbing the amount necessary to arrive at a competitive rate. *See Tennessee Pipeline Company*, 33 FERC ¶61,014 (1985); 33 FERC ¶61,061 (1985). Additionally, Transwestern was not required to apply for or accept a GIC certificate.

Transwestern's allegation that it has a guarantee of gas cost recovery is also at odds with both FERC and court precedent. The Commission has consistently taken the view that a pipeline is entitled not to a *guarantee* that it will recover its costs through commodity charges, but merely a reasonable *opportunity* to do so. *See, e.g., Transwestern Pipeline Co.*, 40 FERC ¶61,324, at 61,994 (1987). The Commission's past rulings on this issue are consistent with decisions by this Court. As it has stated:

> It was noted in the *Hope Natural Gas* case that regulation does not assure that the regulated business [will] make a profit. *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1941); *see FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 590 (1942). All that was held was that a company could not complain if the return which was allowed made it possible for the company to operate successfully. . . . The due process clause has been applied to prevent governmental destruction of existing economic values. *It has not and cannot be applied to insure values or to restore values that have been lost by the operation of economic forces.*

Market Street Ry. v. Railroad Comm'n, 324 U.S. 548, 566-67 (1945). (Emphasis added.)

Under the NGPA, pipelines remain at risk for the recovery of their gas costs and, if full inclusion of those costs in rates would make their gas unmarketable, they may be precluded from recovery as a result of market forces. Indeed, Transwestern asserted in its petition that one reason for the growth in the pipelines' Account 191 balances was that their customers ceased taking pipeline gas and purchased less expensive gas at the wellhead. Transwestern Pet., at 6-7. However, just as "[t]here is no evidence that Congress [in enacting the NGPA] had any intent to create . . . a producer-assistance program," *FERC v. Martin Exploration Management Company*, 486 U.S. 204, 210 (1988), there is no evidence that it envisioned the NGPA as a "pipeline-assistance program." Thus, the possibility that Transwestern may not recover all of its gas costs as a result of the court of appeals decision does not establish grounds for review by this Court.

IV. THE COURT OF APPEALS' OPINION IS NOT IN CONFLICT WITH RULINGS BY OTHER FEDERAL COURTS OF APPEALS.

Transwestern argues that the decision below is in conflict with rulings of the U.S. Circuit Courts of Appeals for the Fifth Circuit and Tenth Circuit in *Texas Eastern Transmission Corp. v. FERC* (*Texas Eastern*), 769 F.2d 1053 (5th Cir. 1985), and *Phillips Petroleum Co. v. FERC* (*Phillips*), 902 F.2d 795 (10th Cir. 1990), respectively. In fact, there is no conflict between the court's rulings and the cited cases.

Both *Texas Eastern* and *Phillips* dealt with regulations issued by the Commission outlining the circumstances under which first sellers[9] of natural gas can recover certain "production-related" costs under NGPA §110(a)(2), 15 U.S.C. §3320(a)(2).[10] The issues raised by this appeal – the scope and meaning of the filed rate doctrine and the authority of the FERC to waive the application of that rule – were not advanced by the parties in those cases or addressed by either court.

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[9] "First sales" of natural gas under the NGPA include all sales to any interstate pipeline, intrastate pipeline, or natural gas local distribution company. 15 U.S.C. §3301(21)(A). First sales do not include sales by those entities unless the gas was produced by the interstate pipeline, intrastate pipeline, local distribution company, or an affiliate thereof. 15 U.S.C. §3301(21)(B).

[10] NGPA §110(a)(2) provides that a price paid above the applicable maximum lawful price (MLP) will not be considered to exceed the MLP if the price exceeds the MLP to the extent necessary to recover qualified production-related costs. 15 U.S.C. §3320(a)(2).

The court's ruling in *Texas Eastern* was based on the language of the NGPA. The pipeline and distributor parties argued that production-related cost allowances should only have been allowed from the date of the Commission's order in 1983 establishing their levels and not retroactively from the Commission's 1980 order in which it had announced its intention to establish such allowances. 769 F.2d at 1066. This argument was based on the explicit statutory requirement that producers could recover (over and above the applicable MLP) only those production-related costs "allowed" by the Commission. *Ibid.* The pipelines and distributors argued that prior to the 1983 order, which set the level of recovery, there was no Commission authorization for recovery of those costs and therefore recovery of such costs prior to that order was unlawful. *Ibid.* To this the court responded that the Commission's order allowing retroactivity was a "fair balancing of the various problems involved." *Ibid.* It therefore allowed retroactive recovery as of the date of the Commission's 1980 order, which provided notice to parties. The effect of the filed rate doctrine on retroactivity was never raised.

The *Texas Eastern* court did touch tangentially on the notice issue presented here and ruled in a manner totally consistent with the court of appeals in this case. The producers had argued that the Commission should be required to allow recovery of production-related costs retroactive to the enactment of the NGPA even though the Commission had never given notice that it might take such an action. Rejecting this request, the court stated that "rules of this type should be made retrospective, absent adequate notice only in rare cases" and that this

was not a case in which retroactivity without notice was appropriate. *Ibid.*[11]

Phillips did not address these issues either. The sole "retroactivity" issue addressed in that case was whether the Commission failed to follow the mandate of the court of appeals in *Texas Eastern* by requiring explicit contractual authorization for retroactive recovery of interest on production-related costs. *Phillips*, 902 F.2d at 803-05. The court ruled only that the Commission had acted "reasonably and within its discretion in requiring contract authority for the collection of interest on retroactive fuel and power allowances . . . . " *Ibid.* at 804. Again, there was no discussion of the filed rate doctrine or the Commission's authority to waive it.

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[11] The Commission's own rulings prior to Transwestern's December 1, 1987 filing are consistent with the court of appeals' view of the notice requirement. In *Kentucky West Virginia Gas Co.*, 37 FERC ¶61,310 (1986), the Commission rejected a proposal by a pipeline to direct bill deferred gas costs to its customers. The Commission rejected arguments by the pipeline that, by virtue of its PGA, its customers had advance notice that they would be subject to collection of the pipeline's unrecovered purchased gas costs. The Commission stated that the "general notice of a repricing right" did not provide sufficient notice to the pipeline's customers to allow retroactive billing to them of deferred gas costs. 37 FERC at 61,912-13.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

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